Rebuttal Testimony of James C. Falvey

Exhibit 1

EXHIBIT 1: E.SPIRE COMMUNICATIONS INC.'S REVISED ISSUES MATRIX
BELLSOUTH TELECOMMUNICATIONS, INC. ARBITRATION
(REVISED AS OF 3/29/2000)

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 1. *Should BellSouth be required to pay liquidated damages for failure to (i) meet provisioning intervals prescribed in the agreement for UNEs, and (ii) provide service at parity as measured by the specified performance metrics?*	Yes	No	*GT&C § 18; GT&C Part B, § 1.64; Att. 9*	**ARBITRATE.**
Issue 2. *Should FCC and Commission orders which are "effective" or "final and non-appealable" be incorporated into the agreement?*	Effective	Final and non-appealable	*Att. 1§ 34.4, Att. 3 § 6.6.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 3. *Should a "fresh look" period be established which permits customers subject to BellSouth volume and term service contracts to switch to e.spire service without imposition of early termination penalties?*	Yes	Unknown	*§ 49*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 4. *Should BellSouth provide intraLATA toll service to e.spire local exchange service customers on the same basis that it provides intraLATA toll services to all customers of BellSouth local exchange services?*	Yes	No	*§ 50.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 5. *Should the definition of "local traffic" include dial-up calling to modems and servers of Internet Service Providers ("ISPs") located within the local calling area?*	Yes	No	*Att. 1 §§ 1.69, 1.92, 1.99, 1.100; Att. 3 §§ 6.1.1, 6.1.2, 6.1.3, 6.10*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 6. *Should the definition of "Switched Exchange Access Service" and "Switched Access Traffic" include Voice-over-Internet Protocol ("VOIP") transmissions?*	No	Yes	*Att. 1§ 1.111; Att. 3 § 6.8.1*	**ARBITRATE.**
Issue 7. *Should e.spire's local switch be classified as both a tandem and end office switch for purposes of billing reciprocal compensation?*	Yes	No	*§ 1.113*	**ARBITRATE.**
Issue 8. *Should BellSouth be required to lower rates for manual submission of orders, or, alternatively, establish a revised "threshold billing plan" that (i) extends the timeframe for migration to electronic order submission and (ii) deletes services which are not available through electronic interfaces from the calculation of threshold billing amounts?*	Yes	No	*Att. 1 Exh. A; Att. 2 § 17.2; Att. 3 § 8; Att. 5 § 5*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 9. *Should BellSouth be required to provide reasonable and nondiscriminatory access to unbundled network elements ("UNEs") in accordance with all effective rules and decisions of the FCC and this Commission?*	Yes	Unknown	*§ 1.8*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 10. *Should BellSouth be required to provide e.spire with access to existing combinations of UNEs in BellSouth's network at UNE rates?*	Yes	Unknown	*§ 1.9*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 11. *Should BellSouth be required to provide access to enhanced extended links ("EELs") at UNE rates where the loop and transport elements are currently combined and purchased through BellSouth's special access tariff?*	Yes	Unknown	*§ 1.10*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 12. *If BellSouth provides access to EELs at UNE rates where the loop and transport elements are currently combined and purchased through BellSouth's special access tariff, should e.spire be entitled to utilize the access service request ("ASR") process to submit orders?*	Yes	Unknown		**ARBITRATE.**
Issue 13. *If e.spire submits orders for EELs, should BellSouth be required to make the resultant billing conversion within 10 days?*	Yes	Unknown	*§ 1.10*	**ARBITRATE.**
Issue 14. *Should BellSouth be prohibited from imposing non-recurring charges other than a nominal service order fee for EEL conversions?*	Yes	Unknown	*§ 1.10*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 15. *Should the parties utilize the FCC's most recent definition of "local loop" included in the UNE Remand Order?*	Yes	Unknown	*§ 2.2.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 16. *Should BellSouth be required to condition loops as necessary to provide advanced services in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 2.5*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 17. *Should the parties utilize the FCC's most recent definition of network interface device ("NID") included in the UNE Remand Order?*	Yes	Unknown	*§ 4.1.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 18. *Should BellSouth be required to offer subloop unbundling in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 6*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 19. *Should BellSouth be required to provide access to local circuit switching, local tandem switching and packet switching capabilities on an unbundled basis in accordance with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 7.1.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 20. *Should the parties utilize the definitions of local circuit switching, local tandem switching and packet switching included in the FCC's UNE Remand Order?*	Yes	Unknown	*§§ 7.2, 7.3, 7.4, 7.7*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 21. *Should BellSouth be required to provide nondiscriminatory access to interoffice transport/transmission facilities in accordance with the terms of the FCC's UNE Remand Order?*	Yes	Unknown	*§ 8*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 22. *Should the parties utilize a definition of interoffice transport consistent with the usage in the FCC's UNE Remand Order, that includes dark fiber, DS1, DS3, OCn levels and shared transport?*	Yes	Unknown	*§ 8.1*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 23. *Should BellSouth provide nondiscriminatory access to operations support systems ("OSS") and should the parties utilize a definition of OSS consistent with the FCC's UNE Remand Order?*	Yes	Unknown	*§ 17.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 24. *Should BellSouth be required to provide specific installation intervals in the agreement for EELs and each type of interoffice transport*	Yes	Unknown	*§ 8.4*	**ARBITRATE.**
Issue 25. *Should BellSouth be compelled to establish geographically-deaveraged rates for NRCs and recurring charges for all UNEs?*	Yes	Unknown	*§ 2.1.2*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 26: *Should BellSouth be required to establish TELRIC-based rates for the UNEs, including the new UNEs, required by the UNE Remand Order?*	Yes	Unknown	*§§1.8, 2.1.*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 27: *Should both parties be allowed to establish their own local calling areas and assign numbers for local use anywhere within such areas, consistent with applicable law?*	Yes	Unknown	*§§ 1.2, 1.9 and 1.10.1*	**ARBITRATE.**
Issue 28 *In the event that e.spire chooses multiple tandem access ("MTA"), must e.spire establish points of interconnection at all BellSouth access tandems where e.spire's NXX's are "homed"?*	No	Yes	*§§ 1.2; 1.9*	**ARBITRATE.**
Issue 29. *Should language concerning local tandem interconnection be simplified to exclude, among other things, the requirement to designate a "home" local tandem for each assigned NPA/NXX and the requirement to establish points of interconnection to BellSouth access tandems within the LATA on which e.spire has NPA/NXXs "homed"?*	Yes	No	*§ 1.10.1*	**ARBITRATE.**
Issue 30. *Should CPN/PLU/PIU be the exclusive means used to identify the jurisdictional nature of traffic under the agreement?*	Yes	No	*§§ 6.2, 6.3, 6.4*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 31. *Should all references to BellSouth's Standard Percent Local Use Reporting Platform be deleted?*	Yes	No	*§ 6.3*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 32. *Should specific language be included precluding IXCs from using "transit" arrangements to route traffic to e.spire?*	No	Unknown	*§ 6.9*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 33. *How should the parties compensate each other for interconnection of their respective frame relay networks?*	Same compensation mechanism that applies to circuit-switched services should apply to packet-switched services	Unknown	*§§ 7.5.5, 7.6, 7.8 and 7.9.1*	**ARBITRATE.**
Issue 34. *Should BellSouth's rates for frame relay interconnection be established at TELRIC?*	Yes	Unknown	*§§ 7.5.5, 7.6, 7.8 and 7.9*	**ARBITRATE.**
Issue 35. *Should BellSouth be required to establish prescribed intervals for installation of interconnection trunks?*	Yes	Unknown	*§ 2.7*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 36. *Should the charges and the terms and conditions set forth in e.spire's tariff govern the establishment of interconnecting trunk groups between BellSouth and e.spire?*	Yes	No	*§2.3*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 37. *For two-way trunking, should the parties be compensated on a pro rata basis?*	Yes	No	*§2.3*	**ARBITRATE.**
Issue 38. *Should e.spire be permitted the option of running copper entrance facilities to its BellSouth collocation space in addition to fiber?*	Yes	No	*§ 5.2*	**ARBITRATE.**
Issue 39. *Should e.spire be required to pay a Subsequent Application Fee to BellSouth for installation of co-carrier cross connects even when e.spire pays a certified vendor to actually perform the work?*	No	Yes	*§ 5.6.1*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 40. *Should BellSouth be required to respond to all e.spire applications for physical collocation space within 45 calendar days of submission?*	Yes	No	*§ 6.2*	**ARBITRATE.**
Issue 41. *When BellSouth responds to an e.spire application for physical collocation by offering to provide less space than requested, or space configured differently than requested, should such a response be treated as a denial of the application sufficient to entitle e.spire to conduct a central office tour?*	Yes	No	*§ 6.2*	**ARBITRATE.**
Issue 42. *Should the prescribed intervals for response to collocation requests be shortened from the BellSouth standard proposal?*	Yes	No	*§§ 6.2, 6.4*	**ARBITRATE.**
Issue 43. *Should BellSouth be permitted to extend its collocation intervals simply because e.spire changes its application request?*	No	Yes	*§ 6.3*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 44. *Should the prescribed intervals for completion of physical collocation space be shortened from the BellSouth standard proposal?*	Yes	No	*§ 6.4*	**ARBITRATE.**
Issue 45. *Should BellSouth be permitted to impose non-recurring charges on e.spire when converting existing virtual collocation arrangements to cageless physical collocation?*	No	Yes	*§ 6.9*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 46. *Should BellSouth be permitted to place restrictions not reasonably related to safety concerns on e.spire's conversions from virtual to cageless physical collocation arrangements?*	No	Yes	*§ 6.9*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 47. *Should BellSouth permit e.spire to view the rates charged and features available to end users in the customer service record ("CSR").*	Yes	No	*§ 2.2.5*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 48. *Should BellSouth be required to provide flow through of electronic orders and processes at parity?*	Yes	Unknown	*§ 2.3.5*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 49. *Should BellSouth be authorized to impose order cancellation charges?*	No	Yes	*§ 3.7*	**CLOSED.** Issue closed during follow-up negotiations between e.spire (B.M.) and BellSouth.
Issue 50. *Should BellSouth be required to provide readily available results of UNE pre-testing to e.spire?*	Yes	No	*§ 3.15*	**ARBITRATE.**
Issue 51. *Should BellSouth be permitted to impose order expedite surcharges when it refuses to pay a late installation penalty for the same UNEs?*	No	Yes	*§ 3.20*	**ARBITRATE.**
Issue 52. *Should BellSouth be required to adopt intervals of 4 hours (electronic orders) and 24 hours (manual orders) for the return of firm order commitments ("FOCs")?*	Yes	No	*§ 3.22*	**ARBITRATE.**
Issue 53. *Should BellSouth be required to adopt a prescribed interval for "reject/error" messages?*	Yes	No	*§ 3.23*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 54. *Should BellSouth be required to establish a single point of contact ("SPOC") for e.spire's ordering and provisioning, e.g., furnishing the name, address, telephone numbers and e-mail links of knowledgeable employee that can assist e.spire in its ordering and provisioning, along with appropriate fall-back contacts?*	Yes	Unknown	*§ 3.2.1*	**ARBITRATE.**

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 55. *Should BellSouth be required to adopt the "Texas Plan" of performance penalties for failure to provide service at parity?*	Yes	No	*Att. 9 App. E*	**ARBITRATE.**
Issue 56. *Should BellSouth be required to establish a new performance measurement metric for the provisioning of frame relay connections?*	Yes	Unknown	*Att. 9 App. F*	**ARBITRATE.**
Issue 57. *Should BellSouth be required to establish a new performance metric for the provisioning of EELs?*	Yes	No	*Att. 9 App. F*	**ARBITRATE.**
Issue 58. *Should BellSouth be required to provide an electronic feed sufficient to enable e.spire to confirm that directory listings of its customers have actually been included in the databases utilized by BellSouth?*	Yes	No	*§ 3(i)*	**ARBITRATE.**
Issue 59. *Should BellSouth and BellSouth and BellSouth Advertising & Publishing Corporation ("BAPCO") be required to coordinate to establish a process whereby INP-to-LNP conversions do not require a directory listing change?*	Yes	No	*§ 3(k)*	**ARBITRATE.**
Issue 60. *Should BAPCO be required to permit e.spire to review galley proofs of directories eight weeks and two weeks prior to publishing, and coordinate changes to listings based on those proofs?*	Yes	No	*§ 3(j)*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.

EXHIBIT 1: REVISED ARBITRATION ISSUES MATRIX

ISSUE	E.SPIRE'S POSITION	BELLSOUTH'S POSITION	AGREEMT. SECTION	REMARKS
Issue 61. *Should BAPCO be required to deliver 100 copies of each new directory book to an e.spire dedicated location?*	Yes	No	*§ 3(l)*	**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.
Issue 62. *Should BAPCO's liability for errors or omissions be limited to $1 per error or omission?*	No	Yes	*§ 5(a)*	**ARBITRATE.**
Issue 63. *Should BAPCO's liability in e.spire customer contracts and tariffs be limited?*	No	Yes	*§ 5(b)*	**ARBITRATE.**
Issue 64. *What are the appropriate rates for the following: Security Access, Assembly Point, Adjacent Collocation, DSLAM collocation in the remote terminal, and non-ICB space preparation charges.*	The rates should be consistent with the requirements of the Telecommunications Act.	In its answer, BellSouth claims that it will file appropriate rates for each of the stated items, as well as cost studies in support of the proposed rates.		**CLOSED.** Issue closed during 3/22/00 settlement negotiations between e.spire and BellSouth.

Rebuttal Testimony of James C. Falvey

Exhibit 2

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Argued November 22, 1999
Decided March 24, 2000
No. 99-1094

Bell Atlantic Telephone Companies, Petitioner v. Federal Communications Commission and United States of America, Respondents Telecommunications Resellers Association, et al.,

Intervenors Consolidated with 99-1095, 99-1097, 99-1106, 99-1126, 99-1134, 99-1136, 99-1145,

On Petitions for Review of a Declaratory Ruling of the Federal Communications Commission

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Mark L. Evans and Darryl M. Bradford argued the causes for petitioners. With them on the briefs were Thomas F. O'Neil, III, Adam H. Charnes, Mark B. Ehrlich, Donald B. Verrilli, Jr., Jodie L. Kelley, John J. Hamill, Emily M. Williams, Theodore Case Whitehouse, Thomas Jones, Albert H. Kramer, Andrew D. Lipman, Richard M. Rindler, Robert M. McDowell, Robert D. Vandiver, Cynthia Brown Miller, Charles C. Hunter, Catherine M. Hannan, Michael D. Hays, Laura H. Phillips, J. G. Harrington, William P. Barr, M. Edward Whelan, III, Michael K. Kellogg, Michael E. Glover, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench. Maureen F. Del Duca, Lynn R. Charytan, Gail L. Polivy, John F. Raposa and Lawrence W. Katz entered appearances.

Christopher J. Wright, General Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Daniel M. Armstrong, Associate General Counsel, and John E. Ingle, Laurence N. Bourne and Lisa S. Gelb, Counsel. Catherine G. O'Sullivan and Nancy C. Garrison, Attorneys, U.S. Department of Justice, entered appearances.

David L. Lawson argued the cause for intervenors in opposition to the LEC petitioners. With him on the brief were Mark C. Rosenblum, David W. Carpenter, James P. Young, Emily M. Wiliams, Andrew D. Lipman, Richard M. Rindler, Robert D. Vandiver, Cynthia Brown Miller, Theodore Case Whitehouse, Thomas Jones, John D. Seiver, Charles C. Hunter, Catherine M. Hannan, Carol Ann Bischoff and Robert M. McDowell.

William P. Barr, M. Edward Whelan, Michael E. Glover, Mark L. Evans, Michael K. Kellogg, Mark D. Roellig, Dan Poole, Robert B. McKenna, William T. Lake, John H. Harwood, II, Jonathan J. Frankel, Robert Sutherland, William B. Barfield, Theodore A. Livingston and John E. Muench were on the brief for the Local Exchange Carrier intervenors.

Robert J. Aamoth, Ellen S. Levine, Charles D. Gray, James B. Ramsay, Jonathan J. Nadler, David A. Gross, Curtis T. White, Edward Hayes, Jr., and David M. Janas entered appearances for intervenors

Before: Williams, Sentelle and Randolph, Circuit Judges.

Opinion for the Court filed by Circuit Judge Williams.

Williams, Circuit Judge: The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151-714, requires local exchange carriers ("LECs") to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." Id. s 251(b)(5). When LECs collaborate to complete a call, this provision ensures compensation both for the originating LEC, which receives payment from the end-user, and for the recipient's LEC. By regulation the Commission has limited the scope of the reciprocal compensation requirement to "local telecommunications traffic." 47 CFR § 51.701(a). In the ruling under review, it considered whether calls to internet service providers ("ISPs") within the caller's local calling area are themselves "local." In doing so it applied its so-called "end-to-end" analysis, noting that the communication characteristically will ultimately (if indirectly) extend beyond the ISP to websites out-of-state and around the world. Accordingly it found the calls non-local. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14 FCC Rcd 3689, 3690 (p 1) (1999) ("FCC Ruling").

Having thus taken the calls to ISPs out of s 251(b)(5)'s provision for "reciprocal compensation" (as it interpreted it), the Commission could nonetheless itself have set rates for such calls, but it elected not to. In a Notice of Proposed Rulemaking, CC Docket 99-68, the Commission tentatively concluded that "a negotiation process, driven by market forces, is more likely to lead to efficient outcomes than are rates set by regulation," FCC Ruling, 14 FCC Rcd at 3707 (p 29), but for the nonce it left open the matter of implementing a system of federal controls. It observed that in the _meantime parties may voluntarily include reciprocal compensation provisions in their interconnection agreements, and that state commissions, which have authority to arbitrate disputes over such agreements, can construe the agreements as requiring such compensation; indeed, even when the agreements of interconnecting LECs include no linguistic hook for such a requirement, the commissions can find that reciprocal compensation is appropriate. FCC Ruling, 14 FCC Rcd at 3703-05 (pp. 24-25); see s 251(b)(1) (establishing such authority). "[A]ny such arbitration," it added, "must be consistent with governing federal law." FCC Ruling, 14 FCC Rcd at 3705 (p 25).

This outcome left at least two unhappy groups. One, led by Bell Atlantic, consists of incumbent LECs (the "incumbents"). Quite content with the Commission's finding of s 251(b)(5)'s inapplicability, the incumbents objected to its conclusion that in the absence of federal regulation state commissions have the authority to impose reciprocal compensation. Although the Commission's new rulemaking on the subject may eventuate in a rule that preempts the states' authority, the incumbents object to being left at the mercy of state commissions until that (hypothetical) time, arguing that the commissions have mandated exorbitant compensation. In particular, the incumbents, who are paid a flat monthly fee, have generally been forced to provide compensation for internet calls on a per-minute basis. Given the average length of such calls the cost can be substantial, and since ISPs do not make outgoing calls, this compensation is hardly "reciprocal."

Another group, led by MCI WorldCom, consists of firms that are seeking to compete with the incumbent LECs and which provide local exchange telecommunications services to ISPs (the

"competitors"). These firms, which stand to receive reciprocal compensation on ISP-bound calls, petitioned for review with the complaint that the Commission erred in finding that the calls weren't covered by s 251(b)(5).

The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate jurisdiction. Here it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations. Because of this gap, we vacate the ruling and remand the case for want of reasoned decisionmaking.

* * *

In February 1996 Congress passed the Telecommunications Act of 1996 (the "1996 Act" or the "Act"), stating an intent to open local telephone markets to competition. See H.R. Conf. Rep. No. 104-458, at 113 (1996). Whereas before local exchange carriers generally had state-licensed monopolies in each local service area, the 1996 Act set out to ensure that "[s]tates may no longer enforce laws that impede[ ] competition," and subjected incumbent LECs "to a host of duties intended to facilitate market entry." AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721, 726 (1999).

Among the duties of incumbent LECs is to "provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access." 47 U.S.C. s 251(c)(2). ("Telephone exchange service" and "exchange access" are words of art to which we shall later return.) Competitor LECs have sprung into being as a result, and their customers call, and receive calls from, customers of the incumbents.

We have already noted that s 251(b)(5) of the Act establishes the duty among local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. s 251(b)(5). Thus, when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call, a cost usually paid on a per-minute basis. Although s 251(b)(5) purports to extend reciprocal compensation to all "telecommunications," the Commission has construed the reciprocal compensation requirement as limited to local traffic. See 47 CFR § 51.701(a) ("The provisions of this subpart apply to reciprocal compensation for transport and termination of local telecommunications traffic between LECs and other telecommunications carriers."). LECs that originate or terminate long-distance calls continue to be compensated with "access charges," as they were before the 1996 Act. Unlike reciprocal compensation, these access charges are not paid by the originating LEC. Instead, the long-distance carrier itself pays both the LEC that originates the call and links the caller to the long distance network, and the LEC that terminates the call. See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16013 (p 1034) (1996) ("Local Competition Order").

The present case took the Commission beyond these traditional telephone service boundaries. The internet is "an international network of interconnected computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." Reno v. ACLU, 521 U.S. 844, 844 (1997). Unlike the

conventional "circuit-switched network," which uses a single end-to-end path for each transmission, the internet is a "distributed packet-switched network, which means that information is split up into small chunks or 'packets' that are individually routed through the most efficient path to their destination." In the Matter of Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11532 (p 64) (1998) ("Universal Service Report"). ISPs are entities that allow their customers access to the internet. Such a customer, an "end user" of the telephone system, will use a computer and modem to place a call to the ISP server in his local calling area. He will usually pay a flat monthly fee to the ISP (above the flat fee already paid to his LEC for use of the local exchange network). The ISP "typically purchases business lines from a LEC, for which it pays a flat monthly fee that allows unlimited incoming calls." FCC Ruling, 14 FCC Rcd at 3691 (p 4).

In the ruling now under review, the Commission concluded that s 251(b)(5) does not impose reciprocal compensation requirements on incumbent LECs for ISP-bound traffic. FCC Ruling, 14 FCC Rcd at 3690 (p 1). Faced with the question whether such traffic is "local" for purposes of its _regulation limiting s 251(b)(5) reciprocal compensation to local traffic, the Commission used the "end-to-end" analysis that it has traditionally used for jurisdictional purposes to determine whether particular traffic is interstate. Under this method, it has focused on "the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers." FCC Ruling, 14 FCC Rcd at 3695 (p 10). We save for later an analysis of the various FCC precedents on which the Commission purported to rely in choosing this mode of analysis.

Before actually applying that analysis, the Commission brushed aside a statutory argument of the competitor LECs. They argued that ISP-bound traffic must be either "telephone exchange service," as defined in 47 U.S.C. s 153(47), or "exchange access," as defined in s 153(16).[1] It could not be the latter, they reasoned, because ISPs do not assess toll charges for the service (see id., "the offering of access ... for the purpose of the origination or termination of telephone toll services"), and therefore it must be the former, for which reciprocal compensation is mandated. Here the Commission's answer was that it has consistently treated ISPs (and ESPs generally) as "users of access service," while treating them as end users merely for access charge purposes. FCC Ruling, 14 FCC Rcd at 3701 (p 17). _____ 1

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[1] "Telephone exchange service" is defined as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. 47 U.S.C. s 153(47).v

"Exchange access" is defined as:

> the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services. Id. s 153(16).

Having decided to use the "end-to-end" method, the Commission considered whether ISP-bound traffic is, under this method, in fact interstate. In a conventional "circuit-switched network," the jurisdictional analysis is straightforward: a call is intrastate if, and only if, it originates and terminates in the same state. In a "packet-switched network," the analysis is not so simple, as "[a]n Internet communication does not necessarily have a point of 'termination' in the traditional sense." FCC Ruling, 14 FCC Rcd at 3701-02 (p 18). In a single session an end user may communicate with multiple destination points, either sequentially or simultaneously. Although these destinations are sometimes intrastate, the Commission concluded that "a substantial portion of Internet traffic involves accessing interstate or foreign websites." Id. Thus reciprocal compensation was not due, and the issue of compensation between the two local LECs was left initially to the LECs involved, subject to state commissions' power to order compensation in the "arbitration" proceedings, and, of course to whatever may follow from the Commission's new rulemaking on its own possible rate-setting.

* * *

The issue at the heart of this case is whether a call to an ISP is local or long-distance. Neither category fits clearly. The Commission has described local calls, on the one hand, as those in which LECs collaborate to complete a call and are compensated for their respective roles in completing the call, and long-distance calls, on the other, as those in which the LECs collaborate with a long-distance carrier, which itself charges the end-user and pays out compensation to the LECs. See Local Competition Order, 11 FCC Rcd at 16013 (p 1034) (1996).

Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long-distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP. The Commission's ruling rests squarely on its decision to employ an _end-to-end analysis for purposes of determining whether ISP traffic is local. There is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate. But it has yet to provide an explanation why this inquiry is relevant to discerning whether a call to an ISP should fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs.

In fact, the extension of "end-to-end" analysis from jurisdictional purposes to the present context yields intuitively backwards results. Calls that are jurisdictionally intrastate will be subject to the federal reciprocal compensation requirement, while calls that are interstate are not subject to federal regulation but instead are left to potential state regulation. The inconsistency is not necessarily fatal, since under the 1996 Act the Commission has jurisdiction to implement such provisions as s 251, even if they are within the traditional domain of the states. See AT&T Corp., 119 S. Ct. at 730. But it reveals that arguments supporting use of the end-to-end analysis in the jurisdictional analysis are not obviously transferable to this context.

In attacking the Commission's classification of ISP-bound calls as non-local for purposes of reciprocal compensation, MCI WorldCom notes that under 47 CFR § 51.701(b)(1)

"telecommunications traffic" is local if it "originates and terminates within a local service area." But, observes MCI WorldCom, the Commission failed to apply, or even to mention, its definition of "termination," namely "the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." Local Competition Order, 11 FCC Rcd at 16015 (p 1040); 47 CFR § 51.701(d). Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the "called party."

In its ruling the Commission avoided this result by analyzing the communication on an end-to-end basis: "[T]he communications at issue here do not terminate at the ISP's local server ..., but continue to the ultimate destination or destinations." FCC Ruling, 14 FCC Rcd at 3697 (p 12). But the cases it relied on for using this analysis are not on point. Both involved a single continuous communication, originated by an end-user, switched by a long-distance communications carrier, and eventually delivered to its destination. One, Teleconnect Co. v. Bell Telephone Co., 10 FCC Rcd 1626 (1995), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, 116 F.3d 593 (D.C. Cir. 1997) ("Teleconnect"), involved an 800 call to a long-distance carrier, which then routed the call to its intended recipient. The other, In the Matter of Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 FCC Rcd 1619 (1992), considered a voice mail service. Part of the service, the forwarding of the call from the intended recipient's location to the voice mail apparatus and service, occurred entirely within the subscriber's state, and thus looked local. Looking "end-to-end," however, the Commission refused to focus on this portion of the call but rather considered the service in its entirety (i.e., originating with the out-of-state caller leaving a message, or the subscriber calling from out-of-state to retrieve messages). Id. at 1621 (p 12).

ISPs, in contrast, are "information service providers," Universal Service Report, 13 FCC Rcd at 11532-33 (p 66), which upon receiving a call originate further communications to deliver and retrieve information to and from distant websites. The Commission acknowledged in a footnote that the cases it relied upon were distinguishable, but dismissed the problem out-of-hand: "Although the cited cases involve interexchange carriers rather than ISPs, and the Commission has observed that 'it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs,' Access Charge Reform Order, 12 FCC Rcd at 16133, the Commission's observation does not affect the jurisdictional analysis." FCC Ruling, 14 FCC Rcd at 3697 n.36 (p 12). It is not clear how this helps the Commission. Even if the difference between ISPs and traditional long-distance carriers _is irrelevant for jurisdictional purposes, it appears relevant for purposes of reciprocal compensation. Although ISPs use telecommunications to provide information service, they are not themselves telecommunications providers (as are long-distance carriers).

In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as "pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies," which use a variety of communication services to provide their goods or services to their customers. Comments of WorldCom, Inc. at 7 (July 17, 1997). Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service).

But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users." Id.

The Commission nevertheless argues that although the call from the ISP to an out-of-state website is information service for the end-user, it is telecommunications for the ISP, and thus the telecommunications cannot be said to "terminate" at the ISP. As the Commission states: "Even if, from the perspective of the end user as customer, the telecommunications portion of an Internet call 'terminates' at the ISP's server (and information service begins), the remaining portion of the call would continue to constitute telecommunications from the perspective of the ISP as customer." Commission's Br. at 41. Once again, however, the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP. However sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation.

Adding further confusion is a series of Commission rulings dealing with a class, enhanced service providers ("ESPs"), of which ISPs are a subclass. See FCC Ruling, 14 FCC Rcd at 3689 n.1 (p 1). ESPs, the precursors to the 1996 Act's information service providers, offer data processing services, linking customers and computers via the telephone network. See MCI Telecommunications Corp. v. FCC, 57 F.3d 1136, 1138 (D.C. Cir. 1995)[2].2 In its establishment of the access charge system for long-distance calls, the Commission in 1983 exempted ESPs from the access charge system, thus in effect treating them like end users rather than long-distance carriers. See In the Matter of MTS & WATS Market Structure, 97 F.C.C.2d 682, 711-15 (p 77-83) (1983). It reaffirmed this decision in 1991, explaining that it had "refrained from applying full access charges to ESPs out of concern that the industry has continued to be affected by a number of significant, potentially disruptive, and rapidly changing circumstances." In the Matter of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 6 FCC Rcd 4524, 4534 (p 54) (1991). In 1997 it again preserved the status quo. In the Matter of Access Charge Reform, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"). It justified the exemption in terms of the goals of the 1996 Act, saying that its purpose was to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services." Id. at 16133 (p 344) (quoting 47 U.S.C. § 230(b)(2)).

This classification of ESPs is something of an embarrassment to the Commission's present ruling. As MCI WorldCom notes, the Commission acknowledged in the Access Charge Reform Order that "given the evolution in [information service provider] technologies and markets since we first established access charges in the early 1980s, it is not clear that [information service providers] use the public switched network in a manner analogous to IXCs [inter-exchange carriers]." 12 FCC Rcd at 16133 (p 345). It also referred to calls to information service providers

[2] The regulatory definition states that ESPs offer "services ... which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 CFR s 64.702(a).

as "local." Id. at 16132 (p 342 n.502). And when this aspect of the Access Charge Reform Order was challenged in the 8th Circuit, the Commission's brief writers responded with a sharp differentiation between such calls and ordinary long-distance calls covered by the "end-to-end" analysis, and even used the analogy employed by MCI WorldCom here--that a call to an information service provider is really like a call to a local business that then uses the telephone to order wares to meet the need. Brief of FCC at 76, Southwestern Bell v. FCC, 153 F.3d 523 (8th Cir. 1998) (No. 97-2618). When accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC Rcd at 3700 (p 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the "exemption," it also rested it on an acknowledgment of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.

Because the Commission has not supplied a real explanation for its decision to treat end-to-end analysis as controlling, Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); 5 U.S.C. s 706(2)(A), we must vacate the ruling and remand the case.

There is an independent ground requiring remand--the fit of the present rule within the governing statute. MCI WorldCom says that ISP-traffic is "telephone exchange service[ ]" as defined in 47 U.S.C. s 153(16), which it claims "is synonymous under the Act with the service used to make local phone calls," and emphatically not "exchange access" as defined in 47 U.S.C. s 153(47). Petitioner MCI WorldCom's Initial Br. at 22. In the only paragraph of the ruling in which the Commission addressed this issue, it merely stated that it _"consistently has characterized ESPs as 'users of access service' but has treated them as end users for pricing purposes." FCC Ruling, 14 FCC Rcd at 3701 (p 17). In a statutory world of "telephone exchange service" and "exchange access," which the Commission here says constitute the only possibilities, the reference to "access service," combining the different key words from the two terms before us, sheds no light. "Access service" is in fact a pre-Act term, defined as "services and facilities provided for the origination or termination of any interstate or foreign telecommunication." 47 CFR § 69.2(b).

If the Commission meant to place ISP-traffic within a third category, not "telephone exchange service" and not "exchange access," that would conflict with its concession on appeal that "exchange access" and "telephone exchange service" occupy the field. But if it meant that just as ESPs were "users of access service" but treated as end users for pricing purposes, so too ISPs are users of exchange access, the Commission has not provided a satisfactory explanation why this is the case. In fact, in In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22023 (p 248) (1996), the Commission clearly stated that "ISPs do not use exchange access." After oral argument in this case the Commission overruled this determination, saying that "non-carriers may be purchasers of those services." In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, FCC 99-413, at 21 (p 43) (Dec. 23, 1999). The Commission relied on its pre-Act orders in which it had determined that non-carriers can use "access services," and concluded that there is no evidence that Congress, in codifying "exchange

access," intended to depart from this understanding. See id. at 21-22 (p 44). The Commission, however, did not make this argument in the ruling under review.

Nor did the Commission even consider how regarding non-carriers as purchasers of "exchange access" fits with the statutory definition of that term. A call is "exchange access" if offered "for the purpose of the origination or termination of telephone toll services." 47 U.S.C. s 153(16). As MCI _WorldCom argued, ISPs provide information service rather than telecommunications; as such, "ISPs connect to the local network 'for the purpose of' providing information services, not originating or terminating telephone toll services." Petitioner MCI WorldCom's Reply Br. at 6.

The statute appears ambiguous as to whether calls to ISPs fit within "exchange access" or "telephone exchange service," and on that view any agency interpretation would be subject to judicial deference. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). But, even though we review the agency's interpretation only for reasonableness where Congress has not resolved the issue, where a decision "is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service." SEC v. Chenery Corp., 318 U.S. 80, 88 (1943). See also Acme Die Casting v. NLRB, 26 F.3d 162, 166 (D.C. Cir. 1994); Leeco, Inc. v. Hays, 965 F.2d 1081, 1085 (D.C. Cir. 1992); City of Kansas City v. Department of Housing and Urban Development, 923 F.2d 188, 191-92 (D.C. Cir. 1991).

* * *

Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs--that s 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have no adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

So ordered.

Rebuttal Testimony of James C. Falvey

Exhibit 3

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-582, SUB 6

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	) ORDER RULING ON
Petition by ICG Telecom Group, Inc. For Arbitration of	) OBJECTIONS, REQUEST FOR
Interconnection Agreement with BellSouth	) CLARIFICATION,
Telecommunications, Inc. Pursuant to Section 252(b) of the	) RECONSIDERATION, AND
Telecommunications Act of 1996	) COMPOSITE AGREEMENT

BEFORE: Jo Anne Sanford, Chair; and Commissioners Robert V. Owens, Jr. and Sam J. Ervin, IV

BY THE COMMISSION: On November 4, 1999, the Commission entered its Recommended Arbitration Order (RAO) in this docket. As part of that Order, the Commission made the following

FINDINGS OF FACT

1. The parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to Internet Service Providers (ISPs) at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by this Order, subject to true-up at such time as the Commission has ruled pursuant to future Federal Communications Commission (FCC) consideration of this matter.

2. ICG Telecom Group, Inc.'s (ICG's) Charlotte switch serves an area comparable to that served by BellSouth Telecommunications, Inc.'s (BellSouth's) Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

3. The Commission declines to decide at this time whether BellSouth should be required to commit to provisioning the requisite network buildout and necessary support. The Commission encourages BellSouth and ICG to continue to negotiate on this issue. Further, the Commission notes that since a similar provision is found in BellSouth's Revised Statement of Generally Available Terms (SGAT) and at least one interconnection agreement, it would appear reasonable for a similar provision to be voluntarily included in the BellSouth/ICG interconnection agreement.

4. The issue of performance measurements and liquidated damages has been, in essence, withdrawn from the arbitration and accordingly is not in need of resolution in this docket. Further, the Commission will create a new docket, Docket No. P-100, Sub 133k, and issue an Order in that docket establishing the generic docket and requesting that the industry, the Public Staff, the Attorney General, and any other interested parties form a Task Force to attempt to agree on all potential issues concerning performance measurements and enforcement

mechanisms. Further, the Commission will issue an Order in Docket No. P-100, Sub 133i (AT&T's Petition for Third-Party Testing) stating that the Commission is investigating performance measurements in a generic docket as a first step, but will keep the third-party testing docket open for future consideration.

On December 6, 1999, BellSouth filed its Objections and Request for Clarification and Reconsideration with an additional letter filed on December 14, 1999, correcting the citations referenced in its Objections and Request for Clarification and Reconsideration. BellSouth stated in its Objections and Request for Clarification and Reconsideration that it seeks clarification and reconsideration concerning: (1) the interim inter-carrier compensation plan adopted by the Commission for ISP traffic; and (2) the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate. BellSouth stated that it seeks clarification of the RAO on two points. First, BellSouth stated that it desires confirmation that any compensation paid pursuant to the interim inter-carrier compensation plan will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration in accordance with the mechanism established by the FCC and the Notice of Proposed Rulemaking (CC Docket 99-68). Second, BellSouth stated that it seeks clarification that the true-up will be triggered, and based on, an effective order by the FCC in CC Docket 99-68 which ensures the most expeditious resolution of this issue for all competing local providers (CLPs) and incumbent local exchange companies (ILECs) operating under the Commission's interim inter-carrier compensation plan. Finally, BellSouth requested the Commission to reconsider its position on the interim inter-carrier compensation rates for ISP-bound traffic and consider an alternative for the payment of those rates and to reconsider its conclusion that ICG is entitled to reciprocal compensation at the tandem interconnection rate.

On December 14, 1999, ICG filed a letter confirming its intentions to file on or before December 21, 1999, a response to BellSouth's Objections and Request for Clarification and Reconsideration.

On December 22, 1999, ICG filed its Opposition to BellSouth's Objections and Request for Clarification and Reconsideration. ICG maintained that BellSouth's filing is nothing more than a rehash of arguments already considered and rejected by the Commission. ICG further maintained that BellSouth's request for clarification is unclear. ICG concluded that neither of the requested clarifications is in any way necessary.

On January 3, 2000, the Public Staff filed its Response to Request for Reconsideration. The Public Staff stated that the single issue it wished to address concerned whether ICG should be compensated for tandem switching. The Public Staff stated that it did not address this issue in its Proposed Order in this docket, however, it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by the LEC.

On January 10, 2000, ICG filed its Reply to the Public Staff's Response. ICG maintained that the Commission correctly concluded that FCC Rule 51.117 provides a single criterion for tandem rate eligibility and that though not required, the record demonstrates that ICG's switch functions

as a tandem. ICG recommended that the Commission deny BellSouth's Request for Reconsideration.

On January 20, 2000, the Commission issued an Order Regarding Maps. The Commission required ICG and BellSouth to submit as late-filed exhibits a map showing ICG's network with relevant switches in North Carolina overlaid against the geographic area which BellSouth's tandem switch serves and the number of BellSouth central offices ICG is presently collocated in within North Carolina by no later than January 23, 2000.

On January 20, 2000, BellSouth filed the Final Order of the Florida Public Service Commission in its ICG/BellSouth arbitration docket.

On February 7, 2000, BellSouth filed its maps in response to the Commission's January 10, 2000 Order. ICG also filed its maps in response to the Order on February 7, 2000.

On February 14, 2000, ICG filed a Notice of Supplemental Authority which included decisions of the Alabama and Georgia Public Service Commissions.

On February 14, 2000, ICG filed a letter to protest the letter filed by BellSouth with its maps stating that BellSouth used its transmittal letter as an opportunity to present its arguments on the tandem rate eligibility issue.

Discussions and Commission conclusions regarding the issues raised by BellSouth in its Objections and Request for Clarification and Reconsideration follow. These matters are addressed below by reference to the specific Findings of Fact which coincide with those findings set forth in the Commission Order entered in this docket on November 4, 1999, which are the subject of said Objections and Request for Clarification and Reconsideration.

FINDING OF FACT NO. 1: Until the FCC adopts a rule with prospective application, should dial-up calls to ISPs be treated as if they were local calls for the purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that the parties should, as an interim inter-carrier compensation mechanism, pay reciprocal compensation for dial-up calls to ISPs at the rate the parties have agreed upon for reciprocal compensation for local traffic and as finally determined by the Commission's Order in this docket, subject to true-up at such time as the Commission has ruled pursuant to future FCC consideration of this matter.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth has asked the Commission for clarification or reconsideration of the following:

1. Confirmation that any compensation paid pursuant to the interim inter-carrier compensation mechanism will be trued-up retroactively to the effective date of the Interconnection Agreement resulting from this Arbitration. BellSouth requested clarification on this point because of the dual

true-up referenced by the Commission in its RAO _ (1) an interim true-up based on the establishment of final unbundled network element (UNE) rates and (2) a final true-up based on the upcoming FCC decision. BellSouth believes that the reciprocal compensation rates should be trued-up once the Commission establishes rates in the UNE docket without regard to any action from the FCC.

2. Clarification regarding the procedure that the parties are to utilize to effectuate the true-up. BellSouth argued that the true-up should be triggered and based upon an effective Order by the FCC. Theoretical alternative dates would be when the FCC decision is released, or as the Commission has implied, after Commission action pursuant to that Order.

3. Reconsideration of the interim-carrier compensation rates for ISP-bound traffic and consideration of an alternative for payment of those rates. BellSouth noted that the Commission had established interim inter-carrier compensation rates at the same level as reciprocal compensation rates for local traffic but, in light of the fact that the interim inter-carrier compensation plan adopted here will be the template for other agreements, BellSouth argued that the rates paid for ISP-bound traffic should reflect the longer holding times associated with ISP-bound traffic. Specifically, BellSouth stated it is willing to accept the 20-minute call duration originally proposed by ICG in this Arbitration. This would yield a minute of use (MOU) total rate of $0.0022806.

BellSouth also requested that the Commission reconsider its ruling regarding payment and allow BellSouth to make payments pursuant to the plan in an interest-bearing escrow account. BellSouth cited substantial risk that it would be unable to recover those funds at final true-up, especially from smaller CLPs.

ICG: ICG urged the Commission to reject BellSouth's request that it modify the inter-carrier compensation rates for ISP-bound traffic based on an average call length (ACL) factor of 20 minutes. ICG argued that the costs it incurs for delivering calls to BellSouth customers are the same regardless of whether the called party is an ISP and thus there is no basis for a different compensation rate. ICG also chided BellSouth for attempting to insert new data in this proceeding purporting to show that the flow of compensation would be one-sided on a statewide basis by citing evidence in another proceeding (BellSouth/Time Warner, Docket No. P-472, Sub 15). Finally, ICG also maintained that BellSouth had not presented the Commission with a workable, alternative compensation mechanism.

ICG further noted that the 20-minute ACL proposal had been originally submitted by ICG itself in response to the Commission's Order seeking alternative approaches to compensation, but that the ICG proposal assumed that the proposed rate would be applied to all calls, not just ISP-bound calls. Moreover, ICG had noted that it had not done a study of actual call lengths and that the 20-minute figure was an "overly conservative" estimate of actual call lengths. In any event, the Commission rejected the ACL proposal. BellSouth is also using the new costs/rates which it proposed in the UNE docket, but these are final rates and not in effect yet. ICG further stated that ISP-bound calls are indistinguishable from other calls; thus there is not a reliable way to identify them.

With respect to BellSouth's requests for clarification, ICG expressed puzzlement. To the extent that BellSouth is asking whether the true-up will be to the final UNE rates and will occur when the FCC issues its final ruling, this would appear consistent with the Order. The true-up, however, should not occur upon the effective date of the FCC Order, since the Commission has made it plain that subsequent proceedings to implement the FCC ruling will be needed. ICG emphatically rejected BellSouth's proposal that the payments be held in escrow as the Commission did in its original ruling.

PUBLIC STAFF: The Public Staff did not address this issue in its Response to Request for Reconsideration.

DISCUSSION

There are two major issues for consideration. The first is BellSouth's request for an alternative inter-carrier compensation mechanism based on a 20-minute ACL rather than one based on the sum of certain UNE rates. The other is BellSouth's request for clarification.

With respect to the first item, the Commission sees no reason to depart from the decision that it has already made on this matter. It is, to say the least, ironic for BellSouth to propose what in essence was a tentative proposal, later withdrawn, originally made by ICG in response to the Commission's request for "creative thinking" on inter-carrier compensation. Apparently, the merits of this proposal became obvious to BellSouth only after its own proposal was rejected. Meanwhile, the merits have become less persuasive to ICG, since it extensively critiqued the deficiencies of the ACL proposal in its reply to BellSouth. This only fortifies the Commission's belief that it would be on the right track to stand by an interim mechanism that is relatively simple and straight forward and tracks the reciprocal compensation rates applicable to other calls.

With respect to BellSouth's request for clarification regarding the inter-carrier compensation rates for ISP-bound traffic, the Commission makes the following clarification:

1. There is to be a first true-up applicable to all traffic subject to reciprocal compensation when the interim UNE rates become final UNE rates. However, if the final UNE rates are effective before the Interconnection Agreement becomes effective, then the final UNE rates will apply, and no such true-up will be necessary. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

2. There is to be a second true-up applicable to ISP-bound traffic at such time as the Commission has issued an Order setting up a permanent inter-carrier compensation mechanism for ISP-bound traffic. The true-up will be retroactive to the effective date of the Interconnection Agreement resulting from this Arbitration.

Finally, with respect to BellSouth's request that BellSouth be allowed to make payments into an interest-bearing escrow account rather than to the CLPs, the Commission finds it appropriate to reject this proposal for the reasons originally set out in the RAO.

CONCLUSIONS

The Commission upholds and reaffirms its original decision in this regard. Further, the Commission finds it appropriate to clarify the true-up process as outlined above.

FINDING OF FACT NO. 2: For purposes of reciprocal compensation, should ICG be compensated for end office, tandem, and transport elements of termination where ICG's switch services a geographic area comparable to the area served by BellSouth's tandem switch?

INITIAL COMMISSION DECISION

The Commission concluded that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and ICG's switch also provides the same functionality as that provided by BellSouth's tandem switch. For reciprocal compensation purposes, the Commission found that ICG is entitled to compensation at the tandem interconnection rate (in addition to the other appropriate rates) where its switch serves a geographic area comparable to that served by BellSouth's tandem switch.

COMMENTS/OBJECTIONS

BELLSOUTH: BellSouth contended that in its RAO, the Commission relied heavily on FCC *Rule* 51.711(a)(3), and failed to consider the FCC's *discussion* of Rule 51.711, which sets forth a two-prong test that must be satisfied prior to a CLP being entitled to reciprocal compensation at the ILEC's tandem interconnection rate. BellSouth noted that, in its discussion, the FCC identified two requirements that ICG, or any CLP, must satisfy in order to be compensated at the tandem interconnection rate: (1) the CLP's network must perform functions similar to those performed by the ILEC's tandem switch; and (2) the CLP's switch must serve a geographic area comparable to the geographic area served by the ILEC.

BellSouth stated that ICG failed to satisfy the first prong of the FCC's two-prong test because ICG's network does not actually perform functions similar to those performed by BellSouth's tandem switch. While ICG's switch may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. Throughout the testimony, ICG repeatedly concluded that ICG's switch "performs the same functionality as the BellSouth tandem switch and end office switch combined." ICG, however, did not offer any evidence to support a conclusion that the ICG switch actually performs functions similar to BellSouth's tandem switch.

BellSouth contended that the only evidence presented by ICG concerning switch functionality revolved around a network diagram attached to witness Starkey's direct testimony. (Starkey direct, at page 22 - diagram 3.) Based on ICG's network diagram, it is clear that: (1) ICG does not interconnect end offices or perform trunk-to-trunk switching, but rather performs line-to-trunk or trunk-to-line switching; (2) to the extent ICG has a switch in North Carolina, it performs only end-office switching functions and does not switch BellSouth's traffic to another ICG switch; and (3) based on the information provided, ICG's switch does not provide other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandems do and as required by the FCC's rules.

BellSouth argued that while ICG witness Starkey insists that ICG's switch performs the same functions as a BellSouth tandem switch, the network design included in witness Starkey's testimony shows that each of ICG's collocation arrangements serve only as an intermediate point in ICG's loop plant. Without specific information from ICG to the contrary, the "piece of equipment" in ICG's collocation cage appears to be nothing more than a Subscriber Loop Carrier, which is part of loop technology and provides no "switching" functionality. ICG's switch is not providing a transport or tandem function, but is switching traffic through its end office for delivery of traffic from that switch to the called party's premises. No switching is performed in these collocation arrangements. These lines are simply long loops transported to ICG's switch; they are not trunks. Long loop facilities do not quality as facilities over which local calls are transported and terminated as described by the Telecommunications Act of 1996 (TA96) and therefore are not eligible for reciprocal compensation.

BellSouth stated that other state commissions have rejected arguments that a CLP's switch performs the same functions as a tandem switch. BellSouth specifically referenced orders by the Florida Public Service Commission which concluded that "...MCI is not entitled to compensation for transport and tandem switching unless it actually performs each function." Order No. PSC-97-0294-FOF-TP, Docket 962121-TP, at 1011 (March 14, 1997), and also Order No. PSC-96-1532-FOF-TP, Docket No. 960838-TP, at 4 (December 16, 1996) which concluded that "...evidence in the record does not support MFS' position that its switch provides the transport element; and the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation."

BellSouth argued that even assuming ICG's switch performs the same functions as BellSouth's tandem switch, there is no evidence in the record that ICG's switch serves a geographic area comparable to BellSouth's tandem switch. BellSouth pointed out there is a distinction between actually serving and being capable of serving. BellSouth stated that, in fact, other than generally referencing ICG switches, there is no record evidence that ICG has a switch in North Carolina. BellSouth contended that when it attempted to determine the number of customers ICG has in North Carolina, ICG conveniently refused, claiming that such information was proprietary. BellSouth stated that ICG also failed to identify where the unknown number of customers are located - information that is essential to support a finding that ICG's switch serves a comparable geographic area. BellSouth contended that under no set of circumstances could ICG seriously argue in such a case that its switch services a comparable geographic area to BellSouth. See Decision 99-09-069, In Re: Petition of Pacific Bell for Arbitration of an Interconnection Agreement with MFS/WorldCom, Application 99-03-047, at 15-16 (September 16, 1999) California Public Service Commission (finding "unpersuasive" MFS's showing that its switch served a comparable geographic area when many of MFS's ISP-bound customers were actually collocated with MFS's switch.)

BellSouth contended that ICG failed to make a showing that its network performs functions similar to those performed by BellSouth's tandem switch and that its switch serves a geographic area comparable to BellSouth's. For these reasons, BellSouth argued that the Commission should reconsider its decision and deny ICG's request for reciprocal compensation at the tandem interconnection rate.

ICG: ICG contended that the Commission's determination that ICG is entitled to reciprocal compensation at BellSouth's tandem interconnection rate is supported by the evidence of record. In response to BellSouth's claim that the Commission failed to consider the FCC's discussion of Rule 51.711, specifically, that the Commission failed to address both parts of the FCC's two-prong test, ICG contended that the Commission did consider BellSouth's contention that Rule 51.711 contains a two criterion test _ and squarely rejected it. The Commission expressly held that the FCC "requires only that a CLP's switch serve a geographic area comparable to that served by an ILEC's tandem to qualify for the tandem termination rates." The Commission should summarily reject BellSouth's attempt to re-argue a point on which the Commission has clearly, and correctly, ruled.

ICG further argued that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem. BellSouth simply refuses to recognize that the evidence it claims to be nonexistent is amply spread throughout the record and that it is totally consistent with the Commission's findings and conclusions on this issue. ICG witnesses Starkey and Schonhaut presented evidence demonstrating that ICG's switch serves a comparable geographic area to that served by BellSouth's tandem switch.

ICG contended that the record evidence is uncontroverted. BellSouth has not so much as suggested, much less proven, that the geographic area served by its tandem switch is not comparable to the area served by ICG's switch. Nor did BellSouth introduce any evidence whatsoever and did not cross-examine ICG's witnesses on this point.

ICG further contended that the record in this proceeding clearly demonstrates that ICG's switch also provides the same functionality as BellSouth's tandem. As ICG witness Starkey testified: "ICG's switching platform transfers traffic amongst discrete network nodes that exist in the ICG network for purposes of serving groups of its customers in exactly the same fashion that [BellSouth's] tandem switch distributes traffic."

ICG argued that BellSouth misses the point of Rule 51.711. BellSouth essentially argues that ICG's switch cannot meet the tandem switching definition because ICG's switch does not route traffic between other ICG switches. Rule 51.711 contemplates that a single CLP switch will serve the same function in the CLP's network that a tandem and multiple serving central office switches serve in the ILEC's network. The rule would be rendered meaningless if CLPs were required to duplicate the ILEC's network architecture in order to qualify for the tandem rate. The FCC made clear that in constructing their networks CLPs may opt to use new technologies that were unavailable when the ILEC's networks were designed: "... states shall ... consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and, thus, whether some or all calls terminating on the new entrant's network should qualify for the tandem rate." ICG contended that its fiber ring is precisely the sort of new technology the FCC had in mind when it adopted Rule 51.711.

In its Reply to the Public Staff's Response to Request for Reconsideration, ICG restated that Rule 51.711 of the FCC rules provides a single criterion for tandem rate eligibility:_ whether the

competing carrier's switch serves an area comparable to that of the ILEC's tandem switch. ICG maintained that the Commission thus correctly rejected the Public Staff's argument that, in order to qualify for the tandem rate, Rule 51.711 requires a competing carrier to also demonstrate that its switch provides functionality similar to that provided by the incumbent's tandem switch. ICG maintained that Rule 51.711 speaks for itself and is unambiguous. If a competing carrier is able to make the geographic showing, it is entitled to the tandem rate, regardless of whether it is able to make the functionality showing.

ICG suggested that the Public Staff's Response should be disregarded and that BellSouth's Request should be denied. As noted in ICG's Opposition to BellSouth's Request, ICG's evidence that the ICG switch serves an area comparable to that served by the BellSouth tandem is uncontroverted in the record.

ICG also contended that even though it is not required, the record demonstrates that ICG's switch functions as a tandem. ICG explained that its witness Starkey offered detailed testimony explaining the configuration of ICG's network and specifically addressed the switch functionality issue. Witness Starkey testified that ICG's network consists of a Lucent 5ESS switch which performs both Class 4 and Class 5 functions, SONET nodes collocated at BellSouth end offices and in ICG on-network buildings, and a fiber optic ring.

ICG contended that the fact that ICG's network incorporates collocated SONET nodes instead of Class 5 central office switches, as BellSouth witness Varner pointed out in his direct testimony, is irrelevant. This difference in architecture between the two networks is a result of the technology each carrier has chosen in an effort to best serve its particular customer base. Witness Starkey testified:

> At the time the majority of the ILEC network was built, switches were very limited in the number of individual lines they could service and copper plant was the most expensive portion of the network to deploy. Therefore, ILECs chose to trade switching costs for copper plant costs by deploying greater numbers of switches and shorter copper loops. However, with the advent of relatively inexpensive fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed.

As witness Starkey further explained in his testimony, ICG's network consists of a centrally-located host switch (defined in the Local Exchange Routing Guide (LERG) as a combination Class 4/Class 5 switch) that supports other, individual switching nodes that are collocated either in BellSouth central offices or in customer locations. ICG's fiber optic ring connects these discrete switching nodes within its network and transfers traffic amongst those nodes. This is exactly the function that BellSouth's tandem switch serves in the BellSouth network. The fact that ICG is not required to place fully-featured Class 5 switches in each collocation does not detract from the fact that the ICG network performs exactly the same function as the BellSouth network; it simply uses a different architecture to accomplish the same tasks. This is exactly what the FCC envisioned in paragraph 1090 of the Local Competition First Report and Order when it directed state commissions to "...consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem...."

ICG stated that the arguments of the Public Staff and BellSouth are premised on the faulty assumption that competing carriers must mimic the incumbents' network to qualify for the tandem interconnection rate. ICG believes that tandem rate eligibility depends solely on geographic service area comparability as expressly provided in Rule 51.711. However, even if the Commission were to conclude that functionality is a second requirement, the Commission could not conclude that identical functionality is the standard. The often quoted paragraph 1090 from the Local Competition First Report and Order expressly contemplates that competing carriers will employ different network architectures than those used by incumbents. In that Order, the FCC notes that new technologies may "perform functions similar - not identical - to those performed by incumbents' tandem switches."

ICG contended that the Public Staff is mistaken in its belief that ICG relies on the fact that its switch serves as a point of interconnection for interexchange carriers (IXCs) and an access point for operator services to establish the tandem status of ICG's switch. These two functions are included in a general description of tandem functionality. Witness Starkey testified that the ICG switch performs nearly all of the functions included in the tandem definition included in the LERG. Indeed, the LERG definition provides that a switch is defined as a tandem if it performs one or more of a list of functions. Witness Starkey testified that the ICG switch performed "nearly all" of the functions enumerated in the LERG. ICG reiterated, however, that no FCC rule or order makes inclusion of a switch in the LERG a requirement for tandem rate eligibility. In conclusion, ICG stated it has met its burden of proving that its Charlotte switch serves an area comparable to that of BellSouth's tandem. ICG asserted that the record evidence on this issue is uncontroverted, and there is no basis to disturb the Commission's conclusion.

PUBLIC STAFF: The Public Staff did not address this issue in its Proposed Order. However, in its Response to Request for Reconsideration, the Public Staff stated that it now believes that the Commission should reconsider and reverse its finding on this issue on the grounds that ICG failed to demonstrate that its switch provides the tandem function in terminating a call delivered to it by a LEC.

The Public Staff indicated that by reading Paragraph 1090 of the FCC's First Report and Order in CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499, as a whole, and as an indication of the FCC's intent in promulgating Rule 51.711, it is clear that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. If the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff contended that ICG's fiber ring is apparently a means of connecting its switch to its customers. Fiber rings can also be used to interconnect end office switches and to reroute traffic in the event that an interoffice circuit is cut. Such is the case with BellSouth. ICG's ring, on the other hand, does not extend between switches, but between ICG customers, and between ICG customers and the ICG switch from which dial tone is provided. Under normal

circumstances, in the termination of a call delivered to ICG by BellSouth, the ICG ring does not perform a function even remotely similar to that of a tandem switch. It actually serves as the loop between the ICG switch, where end office switching is done, and the ICG customer. Tandem switching, if it was involved, would occur at the other end of the circuit, even before the call reached the end office from which dial tone is provided.

The Public Staff stated that ICG's assertions that its switch qualifies as a tandem because it serves as a point of interconnection for traffic to and from IXCs, and as ICG's access point for operator services for its customers are not persuasive. Even if these are considered tandem functions for some purposes, they have no bearing on the issue at hand unless they are actually employed in the process of terminating calls delivered to ICG by BellSouth. Since they are not so employed, they do not qualify ICG for tandem switching and transport compensation. The Public Staff recommended that the Commission reconsider and reverse Finding of Fact No. 2 and Ordering Paragraph No. 2 of the RAO dated November 4, 1999.

The Public Staff also suggested that the Commission consider this issue in conjunction with its deliberations in the pending arbitration between BellSouth and ITC^DeltaCom in Docket No. P-500, Sub 10.

DISCUSSION

The difference in the positions of the parties appears to be due to ambiguity between the language in the FCC's discussion of this issue, Paragraph 1090, and the language in the FCC's Rule 51.711.

ICG's position is that the only relevant criterion is whether ICG's switch serves a geographic area comparable to that served by BellSouth's tandem as stated in Rule 51.711(a)(3). However, even if that is the only requirement, ICG believes that its switch performs the same functionality as BellSouth's tandem switch as discussed in Paragraph 1090 of the FCC's First Report and Order. BellSouth's position is that the discussion of Rule 51.711 which addresses functionality must be considered as well as Rule 51.711(a)(3) and that ICG does not meet either requirement. The Public Staff's position supports that of BellSouth.

Paragraph 1090 of the First Report and Order states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end-office switch. *In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch.* (Emphasis added) Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC

tandem interconnection rate. (First Report and Order, CC Docket 96-98, Paragraph 1090) (August 6, 1996).

Rule 51.711(a)(3) states:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.

On February 7, 2000, ICG and BellSouth filed maps in response to a Commission Order. BellSouth filed a map depicting the geographic coverage of BellSouth's local access and transport area (LATA) tandem switch and a map depicting BellSouth's local tandem switch in the Charlotte area. ICG filed a map showing ICG's Charlotte serving area. These maps are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Commission is unpersuaded by the arguments of BellSouth and the Public Staff in this matter. The Commission believes, based on the evidence in the record, including the maps filed by the parties on February 7, 2000, that ICG has met its burden of proof that its switch serves a comparable geographic area to that served by BellSouth's tandem switch for the Charlotte serving area. Although such information may be both useful and relevant, the Commission can find no basis for BellSouth's argument that the location of actual customers is essential to support a finding that ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch in either Paragraph 1090 or Rule 51.711 of the FCC's First Report and Order. The Commission believes that the testimony of ICG witness Starkey was more cogent and convincing than that of BellSouth witness Varner and that witness Starkey clearly demonstrated that the technologies employed by ICG's network provide functions that are the same as or similar to the functions performed by BellSouth's tandem switch and, in fact, meet both the criteria discussed in the parties' filings.

Since we are persuaded that ICG has demonstrated both geographic and functional capability in this case, we believe that it is unnecessary at this time to decide the question of whether both criteria must be satisfied in order for a CLP such as ICG to receive compensation at the tandem interconnection rate for reciprocal compensation purposes.

CONCLUSIONS

The Commission upholds and reaffirms its original decision and concludes that for reciprocal compensation purposes, based on the fact that ICG's Charlotte switch serves an area comparable to that served by BellSouth's Charlotte tandem switch and provides functionality the same as or similar to that provided by BellSouth's tandem switch, ICG is entitled to compensation at the tandem interconnection rate.

The Commission strongly advises parties involved in future arbitrations where inclusion of the tandem switch element for reciprocal compensation purposes is an issue to file maps showing their serving areas as compared to that of the ILEC serving area, along with substantial testimony including a description of the switch(es) and associated technology necessary to provide service; the number and location of customers, if available; and any other information relevant to capability or intent to serve.

IT IS, THEREFORE, ORDERED as follows:

1. That the Composite Agreement submitted by BellSouth and ICG is hereby approved, subject to such modifications as may be required by this Order.

2. That BellSouth and ICG shall revise the Composite Agreement in conformity with the provisions of this Order and shall file the revised Composite Agreement for review and approval by the Commission not later than 15 days from the date of this Order. Should no revisions be necessary to the Composite Agreement, the parties shall so advise the Commission not later than 15 days from the date of this Order.

3. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

4. That the maps filed in this docket by BellSouth and ICG on February 7, 2000, be, and the same are hereby, admitted in evidence as late-filed exhibits.
ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of March, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Geneva S. Thigpen, Chief Clerk

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